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Supreme Court of the United States CLERK

OCTOBER TERM, 1996

GUY E. ADAMS, *et al.*,

Petitioners,

—v.—

CHARLIE FRANK ROBERTSON and
LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

**BRIEF FOR CONTINENTAL CASUALTY COMPANY,
CNA CASUALTY COMPANY OF CALIFORNIA,
COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY
COMPANY, FIBREBOARD CORPORATION
AND THE GLOBAL HEALTH-CLAIMANT CLASS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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**BRIEF FOR CONTINENTAL CASUALTY
COMPANY, CNA CASUALTY COMPANY OF
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CORPORATION AND THE GLOBAL HEALTH-
CLAIMANT CLASS AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately.

INTEREST OF AMICI

Amici Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, Fibreboard Corporation and the Global Health-Claimant Class are parties to the Global Settlement recently upheld against constitutional challenge by the Fifth Circuit in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996). (The Fifth Circuit denied suggestions for rehearing en banc on November 26, 1996, and petitions for rehearing on December 3, 1996.) That Settlement is a mandatory, non-opt-out class action settlement under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure that resolves disputed insurance claims by creating a fund of over \$1.5 billion for the benefit of a plaintiff class of asbestos victims and establishes a process for equitably distributing that fund among class members. Although substantial distinctions exist between *In re Asbestos Litigation* and the case at bar, amici nevertheless have an interest in the present case because it, like *In re Asbestos Litigation*, involves a challenge to a mandatory class settlement by objectors asserting a constitutional opt-out right.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes before the Court on the following record: (a) the class settlement provides petitioners and their fellow class members with virtually complete relief for their claimed actual injuries, reforming class members' insurance policies in the precise manner they had sought and providing an \$11 million fund sufficient to give class members "full restitution of monetary benefits lost" (Pet. App. 10a-11a); and (b) the settlement was entered by a State court which, as set forth by respondent Liberty National, had personal jurisdiction over petitioners. The 400 petitioners — approximately one-tenth of one percent of the 400,000-member class — assert a constitutional entitlement to scuttle this settlement, and to deprive

the remainder of the class of its benefits, in order that they may individually pursue claims for "mental anguish" and punitive damages. Pet. Br. 18, 23.

Petitioners' argument rests primarily on language from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985). In *Shutts*, the Court approved one of many state-law analogues to Fed. R. Civ. Pro. 23(b)(3), holding that — in a class action "wholly or predominately" for monetary damages in which the forum State otherwise did not have personal jurisdiction over the petitioners — opt-out rights were necessary to satisfy due process requirements. The Court should reject petitioners' attempt to transpose *Shutts*'s language to this very different case: this case involves primarily equitable relief, and *Shutts*, by its own terms, therefore has no applicability to this case. See Point I, *infra*.

No matter how the Court decides that issue, however, amici respectfully submit that it is important that no doubt be cast on the constitutionality of mandatory class actions under the Federal Rules of Civil Procedure, and in particular on the wide range of class resolutions of monetary claims provided for by Fed. R. Civ. P. 23(b)(1)(B). In such actions, class members have an overriding need to have their claims resolved on a unitary basis, and would be severely prejudiced if a few claimants were allowed to pursue individual windfall recoveries. As set forth below, any argument for a constitutional right to opt out would be particularly unfounded as applied to such federal actions: 300 years of historical practice and this Court's precedents establish that opt-out rights need not be provided when unitary resolution of a controversy is necessary, and general due process principles likewise require consideration of the heavy cost of opt-out rights in such cases, including the prejudice to other class members. See Point II, *infra*.

ARGUMENT

I. THIS CASE IS NOT “WHOLLY OR PREDOMINATELY FOR MONEY JUDGMENTS” WITHIN THE MEANING OF *PHILLIPS PETROLEUM CO. v. SHUTTS*

It has long been established, at common law and in this Court’s precedents, that in appropriate cases plaintiffs can and should be bound by mandatory class resolutions where “the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985), citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); see also *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854); pp. 10-13, *infra*. Indeed, this principle is explicitly recognized in Fed. R. Civ. P. 23(b)(1) and (b)(2), which set forth the circumstances under which certification of no-opt-out classes is appropriate. It is significant to note, at the outset, that petitioners apparently do *not* contend that such traditional, mandatory class actions are constitutionally invalid. See, e.g., Pet. Br. 29 (“In cases properly certified pursuant to (b)(1) and (b)(2) but which nonetheless include claims for monetary relief, courts have found that other safeguards may adequately compensate for the lack of an opt-out right.”), 30 (stressing petitioners’ view that the case at bar “was *not* properly certified under either Rule 23(b)(1) or (b)(2)” (emphasis added), 36 (conceding the historical pedigree of mandatory class actions under Rule 23(b)(1)(B)).

Rather, petitioners’ primary contention, based on an out-of-context quotation from *Shutts*, is that there is a constitutional right to opt out of a *subset* of class actions — those that “seek to bind known plaintiffs concerning claims wholly or predominately for money judgments.” 472 U.S. at 811-12 n.3; see Pet. Br. 16-17, 20. Even if petitioners were correct in inferring such a right from *Shutts* (and they are

not*) it would avail them nothing, for the entire premise of their argument — that *this* class action is “wholly or predominately for money judgments” — simply cannot be sustained on the record.

Indeed, far from being “wholly or predominately for money judgments,” the case at bar is in fact predominately equitable in nature.** This case arises from Liberty National’s alleged wrongful switching of the terms of hundreds of thousands of cancer insurance policies to set certain limitations on coverage. Pet. App. 2a-3a. As the courts below found, the gravamen of the class’s claims was *equitable* — for reformation of the policies to reinstate their original terms so that class members would not be denied coverage *in the future*. Pet. App. 12a-13a, 76a, 84a; see generally *Calmar Steamship Corp. v. Scott*, 345 U.S. 427, 435 (1953) (reformation is an equitable

* To avoid unnecessary duplication, amici will not add to respondent Liberty National’s argument — with which amici agree — that the *Shutts* opt-out right is merely a means of obtaining personal jurisdiction over class members and does not apply where there are other valid bases of personal jurisdiction. Amici write separately, however, to emphasize a critical, independent limitation on the scope of *Shutts* — specifically, that it cannot be read to cast doubt on the well-established validity of mandatory class actions in cases, such as those certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) and state-law analogues, in which mandatory resolution has long been considered necessary and appropriate.

** Petitioners and certain amici suggest that the *Shutts* “wholly or predominately” determination must focus solely on the prayer for relief in the complaint, rather than on the substance of the claims actually at issue in the case. See Pet. Br. 18-19. But due process concerns itself with the *actual* interests of class members, which cannot always be determined from the complaint. For example, a class settlement may resolve claims that are not even included in the complaint, see, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996), or may resolve only *some* of the claims in the complaint. Moreover, looking only at the face of a complaint will often leave a court unable to tell which claims have potential merit, and thereby require the court to weigh substantial and insubstantial claims equally in determining which claims predominate. Finally, in some cases a class action is equitable in nature even where the relief prayed for is money damages. See pp. 13-14, *infra*.

remedy). Indeed, the trial court determined upon the basis of expert actuarial testimony that the implied value of the policy reformations constituted the majority of the \$39 million pecuniary value of the proposed settlement approved as modified by the court. Pet. App. 40a-42a.

Petitioner contends, contrary to these findings, that the central claims possessed by class members were for recovery of higher premiums paid under the switched policies, "mental anguish," and punitive damages. Pet. Br. 18. These claims, however, are clearly not the "whol[e] or predominate[]" portion of this action — they are at best appendages to and far outweighed by the claims for reformation of the policies. The court below expressly found that class members' claims for recovery of premiums were legally insubstantial. Pet. App. 15a-16a. And tag-along monetary claims like petitioners' "mental anguish" and punitive damages claims can be alleged to exist in *numerous* mandatory class actions, including those indisputably for equitable relief (such as for injunctive relief against illegal discrimination). Petitioners can cite no authority supporting the proposition that these pendent claims are so substantial as to predominate,* and for good reason: their argument could effectively require opt-out rights in practically every class action on the basis of "pendent" monetary claims, and thereby radically transform both state and federal procedure. See, e.g., *Carson v. American Brands, Inc.*, 450 U.S. 79, 81 & n.2 (1981) (mandatory class in employment discrimination case); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 751 (1976) (same).

Indeed, as to punitive damages, the trial court found that allowing individual class members to seek punitive damages windfalls against Liberty National would "pose[] a substan-

* Indeed, the "mental anguish" claims of class members like petitioners, who never even suffered any denial of benefits, are patently insubstantial. Petitioners, in fact, fail to offer any support — let alone any Alabama authority — for the notion that these tenuous claims are even cognizable.

tial threat to the interests of the class as a whole." Pet. App. 86a. As the court reasoned, the relief in which class members are principally interested — reformation of the policies to afford them full insurance coverage in the years to come — also gave them a critical interest in Liberty National's financial soundness and survival, an interest which would be imperiled by the prospect of large individual punitive damages awards. Pet. App. 86a. *Nothing* in the due process clause precludes the States from providing for the resolution of punitive damages as part of a fair mandatory settlement of class members' equitable claims where permitting individual punitive windfalls would prejudice the remainder of the class. Certainly nothing in *Shutts* — in which the class's claims were solely for compensatory damages, and in which there was no need for a unitary resolution (see 472 U.S. at 799-800) — works that result.

To the contrary, this Court has squarely held that due process does *not* prevent a state from providing for the unitary resolution of monetary claims where legitimate interests would be prejudiced by the failure to do so. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), for example, a State court issued a decree binding on all beneficiaries of a trust fund "settl[ing] all questions respecting the management" of the trust, including both claims regarding the distribution of the fund and *in personam* claims against the trustee for "negligence," "improper management" and "breach of trust." *Id.* at 311.* The Court rejected a due process challenge by beneficiaries (who were not otherwise subject to personal jurisdiction in the State), reasoning that the State had a "vital interest . . . in bringing any issues as to its fiduciaries to a final settlement"; that this interest would be frustrated unless the State court could resolve *all* claims; and that "[a] construction of the Due Process Clause which would place

* Although not technically a class action, *Mullane* closely resembled a class suit in that the claims of numerous absent beneficiaries were adjudicated on a representative basis. See *id.* at 319.

impossible or impractical obstacles in the way could not be justified." *Id.* at 313-14. *See also infra* pp. 10-13 (long tradition establishing permissibility of mandatory class actions where there is a legitimate need for such unitary resolution). Indeed, petitioners here have far less substantial interests in individual adjudication than did the beneficiaries in *Mullane*: the decision below would resolve not traditional compensatory damages claims (as in *Mullane*), but primarily "mental anguish" and punitive damages claims that are simply pendent to predominantly equitable claims. And the interest in preventing individual punitive damages windfalls from undermining the interests of other class members is plainly at least as important as the State's interest in *Mullane* of "bringing any issues as to its fiduciaries to a final settlement."

In sum, neither petitioners' insubstantial higher-premium and mental anguish claims nor their punitive damages claims provide any basis for their contention that this class action is one "wholly or predominately for money judgments," and no basis for requiring the Alabama courts to undermine their resolution of the action as a whole by carving out these tag-along claims.

II. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT OF THE INHERENTLY UNITARY CLASS ACTIONS CERTIFIED UNDER RULES 23(b)(1) AND 23(b)(2)

As noted earlier, amici agree with respondents' argument that the opt-out right referred to in *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 n.3 (1985), has no application beyond the personal jurisdiction context. Amici respectfully submit, however, that there is another critical limitation on the *Shutts* opt-out holding that applies *regardless* of whether personal jurisdiction is at issue: *Shutts* is limited to non-traditional "common question" class actions of the type certified under Fed. R. Civ. P. 23(b)(3) or a state-law analogue*; it has no application to the traditional mandatory,

* *Shutts* itself was a "garden variety" damages class action (which did afford opt-out rights) brought on behalf of a class of 28,000 royalty

no-opt-out class actions certified under Rules 23(b)(1) and 23(b)(2).

Indeed, even petitioners apparently accept this distinction, as they do not challenge the courts' authority to resolve monetary claims in no-opt-out class actions properly certified under Rules 23(b)(1) and (b)(2). The gist of their claim is that the *Shutts* opt-out rule applies because the class herein "was *not* properly certified under either Rule 23(b)(1) or (b)(2)," Pet. Br. 30 (emphasis added), and they concede that the relevant due process considerations are considerably different in cases that *are* properly certified under one of these subdivisions (*see id.* at 29-31, 35-38). Thus, even if this Court were to agree with petitioners that a mandatory class action resolution was inappropriate *on the facts of this case*, there would be no occasion to call into question the validity — which, as demonstrated below, is well established — of mandatory class actions *properly* certified under subdivisions (b)(1) or (b)(2).

A. The constitutionality of Rule 23(b)(1)-(b)(2) class actions is well settled

1. The reasons why *Shutts* does not extend beyond the Rule 23(b)(3)-type class action at issue there are rooted in the entirely distinct historical derivations of Rule 23(b)(1)-(b)(2) class actions and Rule 23(b)(3) class actions. The former are the modern-day versions of the traditional mandatory class action, which dates back to the seventeenth century and whose constitutionality has been settled for almost 150 years.* The latter are, by contrast, a 1966 innovation whose owners residing in all 50 states, the District of Columbia and several foreign countries to whom the defendant oil company allegedly owed interest (in amounts averaging \$100 each) on certain delayed royalty payments from leased land located in 11 different states. *See* 472 U.S. at 799-801.

* This well-established historical practice, of course, is entitled to great weight in assessing the due process calculus as it would apply to class actions under Rules 23(b)(1) and (b)(2), whether one views that historical practice as dispositive (*see, e.g., Burnham v. Superior Court*, 495

only historical antecedent — the “spurious,” opt-in action of the 1938 version of Rule 23 — was itself without historical roots, and was a permissive joinder device rather than a true class action. The version of Rule 23(b)(3) created by the 1966 amendments to the Rules was thus a new, liberalized type of opt-out class action not theretofore recognized, made available for litigation convenience and presenting entirely new and different constitutional issues.

Prior to the creation of the Rule 23(b)(3) class action, it was well-settled that absent class members’ due process rights are satisfied so long as they receive adequate representation. Opt-out rights were thus *not* required in those cases that then qualified for class treatment, even where class members’ claims were a collection of money damages claims and even where class members individually lacked any connection with the forum. Indeed, mandatory “representative suits involving money claims were adjudicated in equity as a matter of course from early times.” Z. Chafee, *SOME PROBLEMS OF EQUITY* 285 (1950). Examples include *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676) (mandatory bill of peace to determine the size of a tithe owed to a parson by his parishioners); *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690) (same); *Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members’ rights to a share of prize money); *Good v. Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same); *Chaney v. May*, 24 Eng. Rep. 265 (Ch. 1722) (mandatory class action brought by one proprietor of a business as representative of “all other proprietors and partners” against the former treasurers and managers of the business for several “misapplications” totalling £50,000); and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805) (mandatory class action to recoup alleged rent

U.S. 604, 610 (1990) (opinion of Scalia, J.)), or as a “significant indicator[] of what we as a people regard as fundamentally fair and rational.” *Schad v. Arizona*, 501 U.S. 624, 643 (1991) (plurality opinion).

overpayments under a contract to which numerous persons were parties). See generally Joseph Story, *COMMENTARIES ON EQUITY PLEADINGS*, §§ 97-98, 100, 120-21 (2d ed. 1840).

Under this settled practice, the courts of equity had power to resolve issues held in common by a large class of persons in order to prevent unfairness or inefficiency, even where the underlying individual claims that gave rise to this need for “equitable” unitary resolution were claims at law: it was “immaterial that the basic issues [were] legal and not equitable.” Chafee, *supra*, at 156 (emphasis added); see also *id.* at 151-52; *Adair*, 32 Eng. Rep. at 1159 (describing this practice as allowing “a person, having at Law a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity”); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854) (“For convenience . . . and to prevent a failure of justice, a court of equity” may resolve “[t]he legal and equitable rights . . . of all being before the court by representation”) (emphasis added).

In such cases, where a need for unitary resolution existed, the courts required only that the interests of absent persons be adequately represented. As Justice Story explained:

In these and analogous cases of general right, the court dispense[s] with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right.

— *West v. Randall*, 29 F. Cas. 718, 723 (C.C.D.R.I. 1820) (Story, J.).*

* See also Joseph Story, *COMMENTARIES ON EQUITY PLEADINGS* § 126 (2d ed. 1840).

This Court, moreover, has long upheld this common-law practice of permitting mandatory class resolution of monetary claims in appropriate cases. In *Smith v. Swormstedt*, *supra*, for example, a plaintiff class of ministers sued a defendant class seeking to establish its ownership of disputed assets. The Court sustained the maintenance of the suit on a mandatory class basis. *Id.* at 302-03. Where a unitary resolution is necessary to "prevent a failure of justice," the Court reasoned, adequacy of representation is all that is required, because "[t]he legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Id.* at 303.

More recent cases have consistently confirmed *Smith*'s conclusion. *See, e.g., Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915) (mandatory class action to determine ownership of a fund); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) ("It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 78-79 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 149 (1917); *see also Mullane*, 339 U.S. at 311-14. Indeed, *Shutts* itself specifically endorsed these holdings. *See* 472 U.S. at 808.

The controlling principle of these cases is straightforward: where a legitimate need for unitary resolution exists, the general presumption in favor of individualized actions is subordinated to equitable concerns permitting a mandatory class action. *See, e.g., Smith*, 57 U.S. at 303 (citing the need to "prevent a failure of justice"); *Hartford Life*, 237 U.S. at 670 (citing the need to avoid "destructi[on] of [class members'] mutual rights"); *see also West v. Randall*, 29 F. Cas. at 723 (Story, J.) (describing the common-law practice of mandatory class resolution as standing on "[t]he principle . . . that the

court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil. . . .") (emphasis added); *Mullane*, 339 U.S. at 313-14 (citing the need to achieve a "final settlement," and stressing that due process cannot be construed to "place impossible or impractical obstacles in the way" of satisfying such a need).*

2. Mandatory class actions under Rules 23(b)(1)-(b)(2) are the present-day equivalent of these traditional — and entirely constitutional — non-opt-out class actions. *See, e.g.,* Advisory Committee Notes to the 1966 Amendments to Rule 23, 39 F.R.D. 98, 100-01 (1966) (citing *Smith*, as an example of class actions falling within (b)(1)-(b)(2)).

Actions under these sections, like their traditional counterparts, are predominantly "equitable in nature." 1 H. Newberg & A. Conte, *NEWBERG ON CLASS ACTIONS* § 1.19, at 1-46 to 1-47 (3d ed. 1992).** They trace their lineage from a

* Petitioners' brief suggestion of an alternative explanation for these cases — that they involve "*in rem* claims" (Pet. Br. 36) — simply misdescribes the cases: *Mullane*, for example, expressly involved *in personam* claims (339 U.S. at 311-14); and *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds (57 U.S. at 302). Petitioners also fail to explain why — other than that *in rem* cases will frequently implicate the requisite need for unitary resolution that justifies mandatory class actions — an *in rem/in personam* distinction should be of any significance here.

** This is true even though both the claims and the ultimate form of relief may involve money, because, as noted above, the *nature* of the proceeding is essentially equitable, arising out of the exigencies that necessitate a common resolution of multiple parties' claims. Equity demands their joint determination so as not to disadvantage any of the multiple parties. *See Chafee, supra*, at 285; pp. 10-11, *supra*. One example of this is the limited fund genus of cases, which, "though they involve money claims individually," are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature." 1 *NEWBERG ON CLASS ACTIONS*, § 1.19, at 1-47; *see also, e.g., In re Joint E. & S. Dist. Asbestos Litig. ("Johns-Manville")*, 129 B.R. 710, 832 (E. & S.D.N.Y. 1991), *vacated on other*

series of equitable procedural rules providing mandatory class mechanisms, including the seventeenth-century English Bill of Peace* and Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no-opt-out class actions were recognized" and "absent parties could be bound by . . . judgments" (1 NEWBERG ON CLASS ACTIONS, § 1.09 at 1-24). Indeed, their direct precursors were the non-opt-out "true" and "hybrid" class action categories of original Rule 23 (adopted in 1938). 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.09 at 1-25 - 1-27; 3B James Moore & John E. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23.31[1], at 23-235 (1992).

In sharp contrast, opt-out class actions under Rule 23(b)(3) and its state-law equivalents were not in existence in any form at the time of *Smith* and *Hansberry* and the other cases cited above. Rule 23(b)(3) opt-out class actions instead originated with the 1966 revision of the Federal Rules permitting the combination of what are essentially individual actions for damages as to which "class action treatment is not as clearly called for as in [(b)(1) and (b)(2) actions], but . . . may nevertheless be convenient and desirable." *Advisory Committee's Note to Rule 23*, 39 F.R.D. 98, 101 (1966); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 394 (1967)). To the extent (b)(3) class actions are traceable to any prior procedure, it is to the "spurious" class action of original Rule 23, which was essentially no more than a permissive joinder device, binding class members only if they affirmatively opted into the class. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967); 3B Moore's *Federal Practice*, ¶ 23.31[1], at 23-235.

grounds, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

* *See, e.g.,* Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39-40 (1986); *see also* D. Laycock, MODERN AMERICAN REMEDIES 346-47 (1985) (bill of peace was a mandatory class mechanism).

Against this backdrop, it is clear that *Shutts*, in which this Court held that the Kansas equivalent of Rule 23(b)(3) was constitutional because it afforded opt-out rights (*see* 472 U.S. at 812), has no applicability to Rule 23(b)(1)-(b)(2) class actions and does not disturb their well-settled constitutionality:

First, the Court expressly stated that this holding was "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," and that it was "intimat[ing] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-12 n.3. And as noted above, Rule 23(b)(1)-(b)(2) class actions are most decidedly "equitable in nature."

Second, far from overruling *sub silentio* 150 years of precedent, *Shutts* took pains to endorse the prior cases upholding traditional mandatory class actions. Thus, it cited *Hansberry v. Lee* with approval for the point that where "the prosecution of the litigation [is] within the common interest" — *i.e.*, in a traditional mandatory class action* — "[t]he absent parties [are] bound by the decree so long as the named parties adequately represented the absent class." 472 U.S. at 808 (emphasis added). Moreover, since *Shutts*, this Court has repeated the endorsement of *Hansberry*. *See Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989). This Court's opinion in *Shutts* simply cannot be read as having discarded a century and a half of case law without saying so directly — indeed, while affirmatively praising the earlier cases.

Third, this Court also cannot have intended in *Shutts* silently to have done away with Rules 23(b)(1)-(b)(2) any time money is in any way implicated (which, as noted, it quite frequently is). Indeed, such a result would totally invalidate the Rule 23(b)(1)(B) "common" or "limited" fund class

* *Compare Smith*, 57 U.S. at 302-03 (describing the mandatory class action upheld there as one asserting a "common interest"); *Ibs*, 237 U.S. at 670-72 (also using the "common interest" formulation).

action, which *always* involves money. Especially since the Rules are presumed constitutional, *see Hanna v. Plumer*, 380 U.S. 460, 471 (1965), that cannot possibly have been this Court's intention. *See* 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.21 at 1-49 (*Shutts* is limited to Rule 23(b)(3) class actions for this reason).*

3. To the extent this Court looks beyond *Shutts* and the historical pedigree of mandatory class actions to the due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), that test fully confirms the historically settled permissibility of such class actions in cases where there is a need — as in Rule 23(b)(1) and (b)(2) class actions — for unitary resolution. The *Mathews* test balances (1) “the private interest that

* For these reasons, cases and commentators have overwhelmingly concluded that *Shutts* leaves intact the long-established propriety of non-opt-out class actions under Rules 23(b)(1)-(b)(2). *See, e.g., Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994) (*Shutts* does not apply to a 23(b)(2) class; “[i]n a Rule 23(b)(2) class for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone”); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.) (finding due process requirements satisfied in state analogue to 23(b)(1) and 23(b)(2) class action because class members received “notice plus an opportunity to be heard and participate in the litigation”), *cert. denied*, 115 S. Ct. 480 (1994); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1302-05 (2d Cir. 1990) (assuming, without even referring to *Shutts*, that there was no right to opt out of a 23(b)(1)(B) class, although permitting a single class member to opt out in the discretion of the District Court); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. Supr. 1989) (holding that no due process right to opt out exists under (b)(2), even though portion of relief sought was monetary); *Arnold v. United Artists Theater Circuit*, 1994 U.S. Dist. LEXIS 15345 (N.D. Cal., Sept. 15, 1994); *White v. National Football League*, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995); Sherman, *Symposium: Class Actions and Duplicative Litigation*, 62 Ind. L. J. 507, 525 (1987); Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J. L. Ref. 347, 376 (1988); Steve Baughman, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 217-20 (1991).

will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335. Where, as here, the due process issue concerns “disputes between private parties rather than between an individual and the government,” the third *Mathews* factor is modified so that “principal attention” is paid to the interests of other affected private parties “with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.” *Connecticut v. Doeher*, 501 U.S. 1, 11 (1991).

All three *Mathews* factors weigh in favor of the conclusion that opt-out rights are not constitutionally required in mandatory class actions properly certified under the Federal Rules. First, *Shutts* itself makes clear that a class member’s “private interest” in avoiding class resolution of his cause of action is considerably less than the interest of a defendant haled into court to defend himself “upon pain of a default judgment.” “The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant.” *Shutts*, 472 U.S. at 808-09.

Second, turning to the “risk of error” that is the focus of the second *Mathews* factor, the carefully designed protections of Rule 23, and the precedents set forth above, demonstrate that there is “very little danger” (*Smith*, 57 U.S. at 303) of an erroneous deprivation where class members are adequately represented by persons with similar interests. *See* pp. 11-12, *supra*; *see also Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (adequate representation in class action permits “exception to the general rule” that every person is entitled to his own day in court); *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*,

311 U.S. 32, for the proposition that absent class members will be bound "so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry*, 311 U.S. at 42-43.*

Third, the final *Mathews* factor, focusing on the private and societal cost of requiring additional procedures, weighs overwhelmingly *against* recognition of an opt-out right in cases where there is a need for unitary resolution, such as those falling within the mandatory class action provisions of the Federal Rules. The historical precedents discussed above developed precisely out of equity courts' recognition that class members (or the party opposing the class) could be profoundly prejudiced absent a unitary resolution of the class's claims. See *Smith*, 57 U.S. at 302-03; *West*, 29 F. Cas. at 722-23 (Story, J.); *Adair*, 32 Eng. Rep. at 1159. For example, "[b]y definition, it is impossible to resolve separately individual claims involving common rights or limited funds." Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 40 (1986). Class actions under Rules 23(b)(1) and (b)(2) thus frequently may involve "equitable circumstances dictat[ing] the need for a unitary resolution regardless of the individual consent of the parties affected. The societal cost of permitting opt-outs for the purpose of individual resolutions in these inherent class action situations could be enormous,

* While adequate representation is a feature of all subdivisions of Rule 23, the *Mathews* "risk of error" in precluding opt-outs is particularly low in actions qualifying for certification as mandatory class actions under the Federal Rules, as compared with those qualifying only under Rule 23(b)(3). This is so because the classes that qualify for mandatory treatment under the Federal Rules are characterized by a greater degree of "cohesiveness" or "unity" compared with Rule 23(b)(3) classes. See, e.g., *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983) ("Rule 23(b)(3) classes are less cohesive, and must abide by more stringent due process constraints."); 3 NEWBERG ON CLASS ACTIONS, § 16.17, at 16-95.

compared to the modest gains at best in constitutional terms for additional individual procedural rights." 1 NEWBERG ON CLASS ACTIONS § 1.22, at 1-51.

This considerable cost contrasts dramatically with the minimal difficulty of providing opt-out rights in Rule 23(b)(3) class actions (such as that at issue in *Shutts*), in which a class is certified *not* to protect class members from prejudice arising from prosecution of separate suits, but for litigation convenience. See, e.g., Advisory Committee's Note, 39 F.R.D. at 102. In these class actions, claims of class members who opt out may easily be adjudicated separately without prejudicing the rights of other class members.

4. In light of the foregoing, amici respectfully submit that the constitutionality of mandatory class actions properly certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) cannot reasonably be questioned. Moreover, given that petitioners do not contend otherwise — rather, they contend that the case at bar was *not* properly certified under these subdivisions, Pet. Br. 30 — there is no occasion in this case to call into question the long-established validity of mandatory class actions that have been properly certified under these subdivisions of the Rule.

B. Class actions certified under Rule 23(b)(1)(B) present a uniquely compelling case for mandatory resolution.

As just set forth, amici believe that mandatory, no-opt-out procedures are constitutional in *all* of the modern-day versions — including both cases falling within subdivision (b)(1) and those within subdivision (b)(2) — of the traditional class actions long upheld by this Court. Amici wish to stress, however, that there is a *uniquely* compelling case for mandatory treatment of classes qualifying under Rule 23(b)(1)(B), a case that should not be foreclosed in an action — like the one at bar — whose facts fit most closely within the framework of a 23(b)(2) class action.

Thus, in many class actions certified under Rule 23(b)(2) — as, for example, in the class action underlying *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) — the justification for mandatory treatment of damages claims is not that individual litigation of the monetary claims will be harmful, but rather simply that such claims are ancillary to a unitary nondamages claim. See 1 NEWBERG ON CLASS ACTIONS § 1.22, at 1-51 n.188.

In contrast, in cases qualifying for class treatment under Rule 23(b)(1)(B), individual litigation of damages claims is harmful; indeed, it is precisely that potential harm that provides the justification for certifying the class. Cases within Rule 23(b)(1)(B) are *by definition* cases in which class members have an overriding need for their claims to be resolved without opt-outs: by its terms the Rule only applies where there is a risk that “adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members . . . or substantially impair or impede their ability to protect their interests.”* As the 1966 Advisory Committee noted in promulgating the present version of Rule 23, “[t]he difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.” Advisory Committee’s Note, 39 F.R.D. at 100.

* For example, a paradigm case fitting within Rule 23(b)(1)(B) is that of claims against a limited fund. In such cases, both the purpose of the class action — to apportion limited resources equitably — and the interests of other class members would be undermined if individual members could opt out and obtain more than their fair share of the fund. Requiring opt-outs in such cases “besides being oxymoronic, [would be] contrary to the very purpose” of Rule 23(b)(1)(B). *In re Joint E. & S. Dist. Asbestos Litig. (“Johns-Manville”)*, 129 B.R. 710, 832 (E. & S.D.N.Y. 1991) (internal quotation omitted), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

In short, in view of the pressing need for unitary treatment of Rule 23(b)(1)(B) cases, “[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.” *Mullane*, 339 U.S. at 314. Thus, although amici believe that the judgment below should be affirmed, amici submit that it is of great importance, even if this Court should choose to reverse, that the Court not cast doubt upon the continuing validity of mandatory class actions under Rule 23(b)(1)(B).

Conclusion

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment below and reaffirm the constitutionality of no-opt-out class actions pursuant to Rules 23(b)(1) and 23(b)(2).

Respectfully submitted,

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